

## Message Text

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UNCLAS STUTTGART 1116

DEPARTMENT FOR SCA/SCS

E. O. 11652: N/A  
TAGS: CARR  
SUBJ: LEGAL REPRESENTATION AVAILABLE TO AMERICANS ARRESTED  
ABROAD

REF: (A) STATE 147704, (B) BONN 10680

1. APPOINTMENT OF "PUBLIC DEFENDER" TYPE OF LEGAL COUNSEL FOR AMERICANS IN GERMANY IS GOVERNED BY THE GERMAN CODE OF CRIMINAL PROCEDURE WHICH DEFINES SPECIFIC CATEGORIES WHERE DEFENSE COUNSEL MUST BE APPOINTED AND GIVES LEEWAY TO PRESIDING JUDGES TO APPOINT COUNSEL IN OTHER CASES WHEN BELIEVED NECESSARY. PARAGRAPH 140 OF THE GERMAN CODE OF CRIMINAL PROCEDURES REQUIRES THAT A DEFENSE ATTORNEY BE APPOINTED IF ANY OF THE FOLLOWING CONDITIONS EXIST:

A) THE MAIN TRIAL IN THE FIRST INSTANCE WILL BE HELD AT THE "LANDGERICHT" (STATE COURT) OR "OBERLANDESGERICHT" (UPPER  
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STATE COURT) LEVEL;  
B) THE ACCUSED IN CHARGED WITH A FELONY (VERBRECHEN);  
C) THE PROCEEDINGS MAY RESULT IN WITHDRAWAL OF A PROFESSIONAL LICENSE;  
D) THE ACCUSED IS DEAF OR DUMB;  
E) THE ACCUSED HAS BEEN CONFINED FOR AT LEAST THREE MONTHS.  
(APPOINTMENT MAY BE CANCELLED IF ACCUSED IS RELEASED AT

LEAST TWO WEEKS BEFORE TRIAL WILL TAKE PLACE).

F) AN EXPERT OPINION MUST BE PREPARED REGARDING THE MENTAL CONDITION OF THE ACCUSED;

G) SECURITY PROCEEDINGS MAY BE HELD;

H) IF A PREVIOUSLY APPOINTED DEFENSE ATTORNEY IS DISMISSED FROM THE PROCEEDINGS.

FURTHERMORE, THE PRESIDING JUDGE MAY APPOINT A DEFENSE COUNSEL UPON APPLICATION OF THE ACCUSED OR ON HIS OWN PREROGATIVE IF PARTICIPATION OF A DEFENSE ATTORNEY APPEARS TO BE WARRANTED OR IF THE ACCUSED APPEARS TO BE UNABLE TO DEFEND HIMSELF. THIS PROVISION LEAVES THE JUDGE A LARGE AREA OF DISCRETION FOR APPOINTING COUNSEL IN CASES NOT SPECIFICALLY COVERED BY PARAGRAPH 140. THIS POST HAS HAD DIFFERENT EXPERIENCES WITH JUDGES. SOME WILL USE THEIR POWERS RATHER LIBERALLY AND NOT HESITATE TO APPOINT COUNSEL, BUT MOST JUDGES ARE RESTRICTIVE IN THEIR INTERPRETATION OF THIS PROVISION AND HAVE SHOWN AN UNWILLINGNESS TO APPOINT COUNSEL IF NOT REQUIRED BY PARAGRAPH 140. WE HAVE NOT OBSERVED GREAT DIFFICULTIES, HOWEVER, BECAUSE MOST ACCUSED AMERICANS ARE COVERED BY ONE OR MORE OF THE SPECIFIED POINTS, BUT THE PROBLEM OCCURS UNDER SECTION (E) WHERE AN ACCUSED MAY WAIT UP TO THREE MONTHS IN INVESTIGATIVE DETENTION BEFORE A FORMAL INDICTMENT IS SERVED AND A LAWYER IS APPOINTED TO DEFEND HIM. GERMAN LAW FURTHER PROVIDES THAT IN ALL CASES OF AN ACQUITTAL, THE STATE WILL BEAR THE COSTS BOTH OF THE PROCEEDINGS AND FOR LEGAL COUNSEL EVEN IF PRIVATELY EMPLOYED. BUT, IN CASES OF A CONVICTION, THE

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ACCUSED IS LEGALLY LIABLE FOR THE COSTS, EVEN IF DEFENSE COUNSEL WAS APPOINTED. IN OTHER WORDS, THE ANSWER TO THE QUESTION WHETHER OR NOT COUNSEL IS GRATIS DEPENDS UPON THE OUTCOME OF THE TRIAL. HOWEVER, EXPERIENCE HAS SHOWN THAT GERMAN OFFICIALS VERY SELDOM ENFORCE THIS PROVISION AND ALLOW AMERICAN ULTIMATELY TO BE DEPORTED OR RELEASED WITHOUT PAYING THESE DEBTS.

2. LEGAL REPRESENTATION IS "READILY AVAILABLE" IN THE SENSE THAT THERE IS NO SHORTAGE OF TRAINED AND EXPERIENCED ATTORNEYS FOR THE COURTS TO APPOINT. THE PROBLEM IS THAT THE COURT OFTEN DOES NOT APPOINT COUNSEL UNTIL RATHER FAR INTO THE PROCEEDINGS, AT LEAST AS VIEWED BY AMERICAN STANDARDS. PARAGRAPH 141 OF THE CODE OF CRIMINAL PROCEDURE PROVIDES THAT IN ALL CASES WHERE DEFENSE COUNSEL IS REQUIRED (THOSE LISTED IN PARAGRAPH 140), THE ATTORNEY WILL BE APPOINTED AS SOON AS THE ACCUSED HAS BEEN ASKED TO MAKE A STATEMENT REGARDING THE INDICTMENT. IF THE INDICTMENT IS FOR A FELONY OR ONE OF THE OTHER CONDITIONS IN PARAGRAPH 140 PERTAINS, AN ATTORNEY WILL BE APPOINTED IMMEDIATELY UPON FORMAL INDICTMENT. IT IS IMPORTANT TO NOTE, HOWEVER, THAT A PERSON CHARGED WITH A MISDEMEANOR WILL NOT HAVE COUNSEL APPOINTED UNTIL HE HAS BEEN

CONFINED FOR THREE MONTHS, EVEN IF AN INDICTMENT FOR THE MIS-  
DEMEANOR HAS BEEN SERVED BEFORE THREE MONTHS HAVE ELAPSED.

3. IT HAS BEEN OUR EXPERIENCE THAT THE LEGAL COUNSEL PROVIDED  
BY COURT APPOINTED ATTORNEYS IS GENERALLY EQUAL IN QUALITY TO  
THAT PROVIDED BY PRIVATE COUNSEL. FACTORS CONTRIBUTING TO  
THIS INCLUDE THE UNIFORMLY HIGH QUALITY OF LAWYERS HERE AND  
THE FACT THAT COURT-APPOINTED LAWYERS ARE WELL COMPENSATED BY  
THE GERMAN GOVERNMENT FOR THE TIME SPENT ON SUCH CASES. THERE  
IS NO PUBLIC DEFENDER'S OFFICE AS SUCH OR GROUP OF LAWYERS  
THAT SPECIALIZE IN TAKING SUCH CASES. LAWYERS APPOINTED BY  
THE COURT ARE ACTIVE IN PRIVATE PRACTICE AND DO NOT APPEAR  
TO BE TRYING TO MAKE A BUSINESS OUT OF COURT APPOINTMENTS.  
ON A NUMBER OF OCCASIONS, THE CONSULATE GENERAL HAS SEEN  
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COURTS APPOINT LAWYERS AS DEFENSE COUNSEL FOR CLIENTS WHO  
HAD ORIGINALLY EMPLOYED THEM BUT THEN COULD NOT AFFORD THEIR  
SERVICES. IN A RECENT CASE, WHEN THE PARENTS OF AN ACCUSED  
AMERICAN UNEXPECTEDLY ARRIVED TO ATTEND THEIR SON'S TRIAL,  
THE COURT-APPOINTED LAWYER WENT OUT OF HIS WAY TO SAE AND  
SPEAK WITH THEM AND HAD HIS STAFF ASSIST THEM WITH TRANSPOR-  
TATION, LODGING AND VISITING THEIR SON IN PRISON. THE PAR-  
ENTS WERE VERY SATISFIED WITH HIS SERVICES, EXPECIALLY BE-  
CAUSE THEIR SON WAS RELEASED ON PROBATION INSTEAD OF IMPRIS-  
ONED FOR 18 MONTHS AS THE PROSECUTOR REQUESTED. OF COURSE NOT  
EVERY COURT APPOINTED LAWYER MEASURES UP TO THESE STAND-  
ARDS BUT NEITHER DOES EVERY PAID PRIVATE COUNSEL NECESSARILY  
PROVIDE ALL THE SERVICES HE OR SHE MIGHT.

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